

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 FUTUREWISE, fka 1000 FRIENDS OF  
4 WASHINGTON,

5  
6 Petitioner,

7 v.

8 THURSTON COUNTY,  
9

10 Respondent.  
11

Coordinated Case Nos.  
05-2-0002 and 09-2-0006

**COMPLIANCE ORDER  
(Agricultural Resource Lands)**

12  
13 **I. PERTINENT PROCEDURAL HISTORY**

14 On April 22, 2009, this Board issued a Compliance Order in Case No. 05-2-0002 finding  
15 that:

16 The County's application of the nine criteria for the designation of agricultural  
17 lands of long term commercial significance, as stated in its Comprehensive Plan,  
18 is compliant with the GMA. However, removing lands from consideration for  
19 designation based on the presence of 51% or more wetlands on a parcel was  
20 clearly erroneous. Such a consideration was not adopted by the County in its  
Comprehensive Plan as one of its designation criteria.<sup>1</sup>

21 The Board remanded the case to the County "to determine if any of the parcels removed  
22 from consideration as agricultural lands of long-term commercial significance based upon  
23 the presence of 51% or more of wetlands qualify for LTA designation under the County's  
24 nine adopted criteria."<sup>2</sup>  
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26  
27 On March 2, 2009 Futurewise filed a Petition for Review (PFR) which was assigned Case  
28 No. 09-2-0006. With this PFR, Futurewise also challenged the County's designation of  
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32 <sup>1</sup> April 22, 2009 Compliance Order, Case No. 05-2-0002, at 15..

<sup>2</sup> Compliance Order, at 15.

1 agricultural lands. In denying the County's Motion for Summary Judgment in that case the  
2 Board held:<sup>3</sup>

3 Futurewise states that *the remaining issue before the Board is whether the*  
4 *County's removal of lands from consideration for designation as agricultural*  
5 *lands of long term commercial significance based on the presence of 51% or*  
6 *more wetlands on a parcel is compliant with the GMA.* This was a matter on  
7 which the County has already been found to be out of compliance with the  
8 Growth Management Act (GMA) in the No. 05-2-0002 case. Consequently, it  
9 cannot be said that the County is entitled to judgment on this issue as a matter  
10 of law, and summary judgment is not appropriate. Futurewise asserts that,  
11 based on the April 22, 2009 Compliance Order, it must prevail on this issue.  
12 But Futurewise did not move for summary judgment. Therefore this issue  
13 remains before the Board. [Emphasis added]

14 In the Order on Motion for Summary Judgment the Board combined Case Nos. 05-2-0002  
15 and 09-2-0006 for the compliance hearing on the common issue of designation of  
16 agricultural resource lands.<sup>4</sup>

17 On June 22, 2009, the Board issued a Final Decision and Order (FDO) in Case No. 09-2-  
18 0006. That FDO affirmed the holding set forth within the April 22, 2009 Compliance Order in  
19 Case No. 05-2-0002 as to the issue of wetlands and agricultural designation.<sup>5</sup>

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21 The matter now comes before the Board following the submittal of Thurston County's  
22 Compliance Report.<sup>6</sup> The Compliance Report describes how the County considered  
23 additional parcels for designation as agricultural lands.  
24

25 No objection to a finding of compliance was filed by the time established by the Board in the  
26 compliance schedules for these cases.  
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31 <sup>3</sup> May 28, 2009 Order on Motion for Summary Judgment, at 4.

32 <sup>4</sup> *Id.* at 5.

<sup>5</sup> June 2009 FDO, at 5-6

<sup>6</sup> Compliance Report for Compliance Action Relating to the April 22, 2009 Compliance Order (Agricultural  
Lands of Long-Term Commercial Significance).

1 On August 26, 2009, the Board held a telephonic compliance hearing. Jeffrey Fancher  
2 represented the County. Futurewise was represented by Robert Beattey. Board members  
3 Nina Carter, William Roehl, and James McNamara attended, with Mr. McNamara Presiding.  
4

5 During the August 26<sup>th</sup> compliance hearing, the County requested a stay be entered in Case  
6 No. 09-2-0006, as that case is on appeal to Thurston County Superior Court,<sup>7</sup> and the  
7 issuance of a compliance order would render the appeal moot. The Board requested that  
8 the County file a written motion, in order to give Petitioner an adequate opportunity to  
9 consider and respond. The County filed its motion for a stay on August 28, 2009 and on the  
10 same day Futurewise filed an Objection to Motion for Stay. On September 3, 2009 the  
11 Board denied the County's motion for a stay.  
12

## 13 **II. BURDEN OF PROOF**

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15 After a board has entered a finding of non-compliance, the local jurisdiction is given a period  
16 of time to adopt legislation to achieve compliance.<sup>8</sup>  
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18 After the period for compliance has expired, the board is required to hold a hearing to  
19 determine whether the local jurisdiction has achieved compliance.<sup>9</sup>  
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21 For purposes of board review of the comprehensive plans and development regulations  
22 adopted by local governments in response to a finding of non-compliance, the presumption  
23 of validity applies and the burden is on the challenger to establish that the new adoption is  
24 clearly erroneous.<sup>10</sup>  
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26 In order to find Thurston County's action clearly erroneous, the Board must be "left with the  
27 firm and definite conviction that a mistake has been made."<sup>11</sup>  
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30 <sup>7</sup> Cause No. 09-2-01747-3.

31 <sup>8</sup> RCW 36.70A.300(3)(b).

32 <sup>9</sup> RCW 36.70A.330(1) and (2).

<sup>10</sup> RCW 36.70A.320(1),(2) and (3).

<sup>11</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 Within the framework of state goals and requirements, the boards must grant deference to  
2 local governments in how they plan for growth:

3 In recognition of the broad range of discretion that may be exercised by counties  
4 and cities in how they plan for growth, consistent with the requirements and  
5 goals of this chapter, the legislature intends for the boards to grant deference to  
6 the counties and cities in how they plan for growth, consistent with the  
7 requirements and goals of this chapter. Local comprehensive plans and  
8 development regulations require counties and cities to balance priorities and  
options for action in full consideration of local circumstances.

9 The legislature finds that while this chapter requires local planning to  
10 take place within a framework of state goals and requirements, the ultimate  
11 burden and responsibility for planning, harmonizing the planning goals of this  
12 chapter, and implementing a county's or city's future rests with that community.  
13 RCW 36.70A.3201 (in part).

14 In sum, the burden is on the Petitioner to overcome the presumption of validity and  
15 demonstrate that any action taken by Thurston County is clearly erroneous in light of the  
16 goals and requirements of Ch. 36.70A RCW (the Growth Management Act).<sup>12</sup> Where not  
17 clearly erroneous and thus within the framework of state goals and requirements,  
18 the planning choices of the local government must be granted deference.<sup>13</sup>  
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### 20 III. DISCUSSION

21 In response to the Board's April 2009 Compliance Order in Case No. 05-2-0002, the County  
22 performed a "preliminary spatial data analysis" to consider for designation lands that met the  
23 nine criteria for agricultural lands as identified in Chapter Three – Natural Resource Land of  
24 the Thurston County Comprehensive Plan. During the Planning Commission public hearing  
25 process, the County considered expert testimony that suggested lands that contained Class  
26 I wetlands and not currently in an agricultural use should not be designated as agricultural  
27 lands due to impacts on wetlands. The County performed additional analysis to identify: a)  
28 lands with Class I wetlands; b) lands that meet all the nine adopted comprehensive plan  
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32 <sup>12</sup> RCW 36.70A.320(2).

<sup>13</sup> RCW 36.70A.3201.

1 criteria; and c) parcels that may be been considered for agricultural land designation, but  
2 were eliminated because the parcel patch size was under the minimum requirement when a  
3 parcel with over 51% wetlands was removed.

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5 This process indicated that 15 additional parcels, totaling 804 (+/-) acres were suitable for  
6 agricultural lands designation. The County revised maps M-42 and M-15 of the Future Land  
7 Use map of the Thurston County Comprehensive Plan and official Thurston County zoning  
8 map to reflect rezoning of these parcels from rural densities of 1 dwelling unit per 5 acres  
9 (1:5) to the Agricultural Lands zoning density of 1 dwelling unit per 20 acres (1:20).

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11 This action on the part of the County also addressed the area of non-compliance found in  
12 the Board's June 22, 2009 Final Decision and Order in Case No. 09-2-0006. Futurewise did  
13 not file objections to compliance and at the August 26 compliance hearing agreed that the  
14 County's recent amendments cured the areas of non-compliance previously found by the  
15 Board with regard to the designation of agricultural lands of long term commercial  
16 significance.

#### 17 18 19 **IV. ORDER**

20 The County's action in reviewing parcels that were previously not considered for agricultural  
21 lands designation and designating an additional 15 parcels that meet the County's nine  
22 adopted criteria for designation cures the area of non-compliance previously found by the  
23 Board in Case Nos. 05-2-0002 and 09-2-0006. Case No. 09-2-0006 is CLOSED, as is the  
24 agricultural lands designation portion of Case No. 05-2-0002.

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27 Entered this 3rd day of September, 2009.

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James McNamara, Board Member

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31 \_\_\_\_\_  
William Roehl, Board Member

Nina Carter, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

**Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

**Service.** This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)